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Supreme Court, U.S.
FILED
SEP 26 1992
OFFICE OF THE CLERK

No. 92-551

In The

Supreme Court of the United States

October Term, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

Petitioners,

vs.

ALPINE RIDGE GROUP, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT ALPINE'S BRIEF IN OPPOSITION

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Respondent Alpine respectfully requests that this Court deny HUD's petition for a writ of certiorari.

STATEMENT OF THE CASE

This case is about "Section 8," a once successful HUD program of the 1970's to "privatize" low income housing. Under

that program, HUD induced private developers to sign long-term contracts to build, own, operate and maintain specialized rental housing for the elderly, handicapped, and poor at specific locations selected by HUD. For the developers it was a high risk program to perform a governmental function (housing the poor) with the incentive for profit and the risk of loss.[1]

The trial courts below, and the Ninth Circuit, found that the contracts "are bargained-for agreements for which plaintiffs paid valuable consideration — they built and maintained low income housing in accordance with HUD's requirements."[2] The contracts expressly provide that they are backed by the "full faith and credit" of the United States.[3]

A primary inducement for developers to enter into the contracts was a provision requiring HUD to make "automatic" annual inflation adjustments to the initial rents negotiated with the developers.[4] The "automatic" adjustments were to be based on inflation factors selected by HUD and published in the Federal Register. HUD sold the program on the promise that the rent adjustment process would be open, objective and hassle-free, unlike the subjective and torturous *project-by-project* process of

1. Senate Report No. 93-693, p. 4314 (Feb. 27, 1974).

2. Petition for Certiorari, Appendix E, p.53a.

3. *Ibid* at p. 53a.

4. The tenant pays a portion of the rent and HUD pays the balance. Adjustments in rents do not affect the amount of rent the tenant pays, which is based solely on a percentage of the tenant's income. *See* Comment 24 C.F.R. § 20083 (May 1, 1991).

rent adjustments used in previous low income housing programs.[5]

From 1974 to 1981 the program attracted hundreds of developers and ran smoothly. The initial rents were negotiated between HUD and the developer, and the developer received inflation adjustments based on HUD's published factors. HUD ensured accurate inflation adjustments by monitoring and selecting the factors and geographical areas based on statistical data and local market conditions.

Beginning in 1981, HUD responded to budgetary pressures by attempting to repudiate the rent adjustment method it used to induce the developers to build and operate the housing. Instead of using its published factors, HUD began to selectively cut rents based on a *project-by-project* method it euphemistically called a "comparability study." The comparability method gave local HUD personnel the license to ignore HUD's factors and selectively cut rents based on arbitrary comparisons with the rents charged by non-assisted housing in the geographical area. Untrained HUD clerks performed "comparability studies" without regulations, handbook provisions, or any other standards or guidelines. The process was described by Congress as follows:

> HUD field offices have been making capricious individualized rent reductions . . .

5. The previous low income housing program was the disastrous Section 236 program. It used government insured mortgages and provided for project-by-project rent adjustments by local HUD officials. The adjustments proved to be unpredictable, time-consuming, and often applied selectively and arbitrarily depending on the HUD employee administering the adjustment and the owner's relationship with that employee (*i.e.*, favoritism or retribution). Rejected and delayed rent adjustments resulted in deferred maintenance, cuts in services, vacancies, and defaulted mortgages. Since the mortgages were government insured, the developers simply walked away from troubled projects, leaving HUD to foreclose.

> such reductions and other rent limitations have been made on an ad hoc and arbitrary basis . . .[6]

HUD claimed its comparability studies demonstrated that rents produced by *its own published factors* were "excessive" and should be cut. In fact, the district court in this case described the results of HUD's rent cuts as follows:

> Plaintiffs have demonstrated great hardship. Some plaintiffs have foregone all return on their investment; others have no money for necessary repairs; and still other are now teetering on the brink of foreclosure."[7]

In *Rainier View Associates v. United States,*[8] the Ninth Circuit ruled that HUD elected the factor method of rent adjustment in the contract and could not circumvent that election under the pretext of preventing "excessive" rents. The court held that HUD was required to prevent excessive rents within the framework of the rent adjustment method it wrote into the contract, *i.e.*, by adjusting the factors in geographical areas, just as it had before the budget crisis in 1981 corrupted HUD's original understanding and administration of the program.

HUD represented to the court, and announced to Section 8 owners throughout the Ninth Circuit,[9] that it would acquiesce in the *Rainier View* decision and bring rents to their proper levels. Instead, HUD proceeded to ask Congress for authority to do

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6. H.R. 100-122, June 2, 1987.

7. *Alpine, et al. v. Kemp,* May 21, 1991.

8. 848 F.2d 988 (9th Cir. 1988), *cert. denied,* 490 U.S. 1066 (1989). *See* Appendix A.

9. Petition for Certiorari, Appendix E, p. 42a.

precisely what the Ninth Circuit ruled it could not do; that is, circumvent its contractual election to use the factor method of rent adjustment. HUD inserted a provision (Section 801) in the 1989 HUD reform bill which abrogated the owner's contractual right to factor rent adjustments, retroactively and prospectively.[10]

A. Section 801

On November 22, 1989, Congress passed H.R. 1, entitled "Department of Housing and Urban Development Reform Act of 1989" (the "Bill"). The Bill was signed by the President on December 15, 1989, as Pub. L. No. 101-235, 103 Stat. 1989. It deals with a number of HUD abuses reported in the press during the summer and fall of 1989.

Tacked on at the end of the Bill was Section 801, entitled "annual adjustment factors for Section 8 rents." The essence of Section 801 is that Section 8 owners who had been victimized by HUD's comparability process were to be further victimized. Owners previously affected by HUD's comparability process would be forced to accept 30 cents on the dollar for rents due under their contracts. In addition, Section 801 authorized project-by-project comparability studies in lieu of factor adjustments for all owners, directly contrary to the owners' contract rights. In short, Section 801 permitted HUD to do exactly what the Ninth Circuit held was not permitted under HUD's Section 8 contracts.[11]

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10. Secretary Kemp introduced the HUD Reform Bill on October 30, 1989. Cong. Rec. H9885 (Nov. 21, 1989). Section 801 of the Bill addressed the *Rainier View* litigation. *See* Cong. Rec. S. 16601 (Nov. 21, 1989).

11. Senator D'Amato, one of the Bill's sponsors, stated: "In addition, the legislation addresses a controversial ruling in the Ninth Circuit relating to the *Rainier View* case." Cong. Rec.S. 16601 (Nov. 21, 1989). Addendum 14.

Section 801 is not a simple tinkering with the rent adjustment process. It strikes at the very heart of the Section 8 contracts. It eviscerates the factor method of rent adjustment which the Ninth Circuit held was required by the contracts. If Section 801 stands, Congress will have unilaterally amended HUD's contracts to permit project-by-project comparability studies as a substitute for the factor method. The change is material. No Section 8 owner would have taken the risks of the program knowing he could be subject to the whims and caprice of the project-by-project comparability process which Section 801 now authorizes.

B. The Purpose Of Section 801

It is clear from the legislative history that the primary purpose of Section 801 was to save money:

> *Senator Sasser* (Chairman Budget Committee):
>
> Mr. President, I would like to enter into a colloquy with the chairman of the Subcommittee on Housing and Urban Affairs to *clarify the intent of the legislation* with respect to Section 801, "annual adjustment factors for Section 8 rent."
>
> At the outset, I would like to offer my congratulations to the chairman for addressing the very complex situation surrounding the *Rainier View* decision. Indeed, by moving quickly to enact this legislation with its *Rainier View* "fix" we could save the Government hundreds of millions, if not more than a billion dollars.

Cong. Rec. S. 16607 (Nov. 21, 1989).

HUD does not dispute the fact that Section 801 substantially impairs plaintiffs' contract rights to factor rent adjustments.[12]

C. The Decision Below

Plaintiffs challenged Section 801 asking: "does congress have the power to abrogate the government's bargained-for financial contracts in order to save money?"

The Ninth Circuit held that Congress did not have such power. It held that Section 801 "unconstitutionally abrogates the owners' vested property rights in violation of the fifth amendment."[13]

The court pointed out that plaintiffs' contract rights were "supported by independent consideration and are therefore vested under the Supreme Court's decisions in *Lynch v. United States*, 292 U.S. 571 (1934) (Lynch) and *Perry v. United States*, 294 U.S. 330 (1935) (Perry)." The court distinguished the "sovereign powers"

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12. Before the trial court and the Ninth Circuit, HUD conceded this point. *See* Petition for Certiorari, Appendix B, p. 12a, p. 27a. HUD now suggests (fn. 14) that since comparability could theoretically produce the same result as the factor method, Section 801 does not impair a substantive right. Pigs will fly before the two approaches produce the same result.

Since the two approaches are not attempting to do the same thing, the results will never be the same. The factor approach attempts to keep initial contract rents even with the movement of rents in the local market. As explained later in the text, the comparability approach that HUD argues for is an attempt to remeasure (and undo) the initial relationship of contract rents to the market. One is a principled and objective attempt to keep contract rents even with inflation. The other is an attempt to save money by a subjective reanalysis of the rents originally agreed upon.

13. Petition for Certiorari, Appendix A, p. 14a.

doctrine (it does not apply to bargained-for financial contracts), curative legislation cases (which cure faulty interpretations of statutes, not contracts), and HUD's claim that some rational basis for the legislation existed other than to save money.

D. HUD's Version Of This Case

To mask its conduct, HUD puts a "spin" on the Section 8 program, the rent adjustment process, the *Rainier View* case, and Section 801, that at best has fleeting contact with the undisputed facts.[14] Some of HUD's more egregious misstatements are:

1. That the Section 8 new construction program "was designed simply to provide prevailing market rents."[15] That statement is false. It is critical because it permeates HUD's misdescription of the new construction program.[16]

To understand this case, it is necessary to properly understand the basic facts of the Section 8 new construction program. The first basic fact is how the parties arrived at initial contract rents.

Initial rents under the new construction program were not market rents. They were negotiated rents, based on the costs of construction.[17] Initial rents were not market rents for the simple

14. Sworn affidavits of plaintiffs have not been challenged by HUD.

15. Petition for Certiorari, p.19a..

16. HUD confuses the new construction program and the existing housing program. Under the existing housing program, rents are market rents since the housing was built as market housing (not under the Section 8 program) and formerly rented as such. There is no reason, other than HUD red tape, why existing housing should rent for more simply because it is rented to low income tenants.

17. In the case of HUD insured Section 8 projects, costs had to be certified on completion of construction.

reason that there was no comparable renting housing. Indeed, the sole purpose of the new construction program was to produce rental housing that the market had not produced. [18] The market had not produced the desired rental housing because it was not good economics.

HUD regulations required that initial rents not exceed 120% of what it termed Fair Market Rents.[19] That term was not the same as "market rents." It was defined by regulation as those rents "required to be paid in order to obtain privately developed and owned newly constructed rental housing . . . ."[20]

Since newly constructed rental housing of similar design and amenities did not exist at the locations specified by HUD, it was unrealistic for HUD to come up with Fair Market Rents based on anything other than costs. In addition, HUD's special construction requirements, and Davis Bacon wage rates, increased the developer's costs by close to 50%, necessitating higher Fair Market Rents. As a result, Fair Market Rents, and the companion requirement that rents be "reasonable,"[21] were interpreted by HUD as justifying the rents necessary to make projects financially feasible. Otherwise, no projects would have been developed.

As an example,[22] in 1979 HUD advertised for proposals to

18. HUD regulations provided that "New construction projects shall be permitted only where . . . HUD determines that there is not and there is not likely soon to be an adequate supply of existing housing . . . [to] meet the needs of eligible families." 24 C.F.R. § 880.103 (April 29, 1975).

19. HUD also "trended" rents to the completion of construction.

20. 24 C.F.R. § 880.102 (April 29, 1975).

21. 24 C.F.R.§ 880.108 (April 29, 1975).

22. Taken from the record in *Rainier View*.

build housing for the elderly in Puyallup, Washington, a town of less than 30,000. Retirement housing already existed in Puyallup, but it rented for $800 to $900 a month, without meals. That was far too much for a senior citizen trying to live on a $600 monthly social security check. As a result, many of Puyallup's elderly lived in substandard housing. It was not a group that could afford to pay for decent housing close to transportation and medical and community services.

In response to HUD's invitation, Ray Dally, a local builder, submitted a proposal. His proposal was to build 25 one bedroom apartments in a three-story, brick, elevatored building. It would have a mechanical core, elevator machinery room, elevator shaft, elevator, elevator lobbies on each floor, extra wide interior hallways and stairways with handrails down both sides of the stairs and halls, social hall, handicapped restrooms and an entry security system which was remote controlled by each individual resident from their own apartment. Each apartment had an emergency call light, bathroom grab bars, smoke detectors and automatic fire alarms. The project was near downtown, on expensive land, close to transportation, medical and community services. With a view of Mt. Rainier, it was to be named "Rainier View."

Dally's proposal was accepted. At that point, Dally and HUD agreed by contract that the initial rents for an apartment would be $315 a month. The contract was pledged by Dally to a local bank to secure financing for the project. From the viewpoint of Dally and his bank, the contract rent of $315 was required to justify Dally's high cost of building and financing a specialized building under HUD regulations. In addition, Dally would be operating a difficult social program based on HUD's promise that he would be paid for doing the government's job.

The rent of $315 a month was also agreeable to HUD, even though recently constructed one bedroom apartments in Puyallup rented for under $200 a month. Nonetheless, HUD internally determined that the Dally rents were "reasonable" in light of HUD's special requirements and the uniqueness of the project. There would be nothing like Rainier View in the City of Puyallup, except for retirement housing which rented for two to three times the Rainier View rent. Certainly the wood frame walk-up apartments in the area which rented for under $200 were not comparable.

In any event HUD *agreed* to the original rents. In doing so, HUD interpreted its authority under the Act to justify the rents which were necessary to make the project financially feasible and induce Dally to build. In no sense were those rents "market" rents.

2. HUD's second misstatement is that HUD would "conduct appraisals . . . as a cap to increases produced under the adjustment factors,"[23] That statement is false. It is designed to make an irrational process for *cutting* (not capping) rents by telephone surveys (not appraisals) appear as a principled process to carry out a congressional mandate. In fact, it is a process calculated by HUD to undermine its original agreement on rents.[24] The fact is also

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23. Petition for Certiorari, p. 6

24. In directions to its offices processing retroactive rent payments under the law at issue in this case, HUD stated:

> "Before calculating the amount of any retroactive payment, the PHA, if directed by HUD, will review whether rents were excessive when initially set." 56 Fed. Reg. 20086 (1991).

(Cont'd)

basic to a proper understanding of this case.

Not only did HUD agree on the initial rents, it agreed that the *relationship* of the initial rents to the market would be preserved. For example, Ray Dally's original rents were $315 a month because of the uniqueness of the Rainier View project. At the same time, new walk-up apartments in the area rented for $200 a month. Ten years later if the $200 rent had increased by 50% to $300, Dally's $315 rent was to have moved 50% to $472.50. Only in that way could Dally be assured of getting a return on his investment comparable to what he would have received had HUD not induced him to enter the Section 8 program. To guarantee Dally that he would get inflation adjustments on a regular basis while preserving the intitial relationship of his rents to the market, his contract with HUD provided:

> *Automatic Annual Adjustments.*
>
> (1) Automatic Annual Adjustment Factors will be determined by the government at least annually; interim revisions may be made as market conditions warrant. Such factors and the basis for their determination will be published in the Federal Register.
>
> (2) On each anniversary date of the contract, the Contract Rents shall be adjusted by

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(Cont'd)

This direction reveals HUD's mind set. First, rents were not "set" by HUD, they were agreed upon between HUD and the developer. Second, HUD has no authority to revisit its original agreement on rents. The developer relied on those rents in making his decision to proceed with the project. Both parties must live with their bargain.

> applying the applicable automatic annual adjustment factor most recently published by the government.
>
> * * *
>
> *Overall Limitation.*
>
> Notwithstanding any other provision of this contract, adjustments as provided in this section shall not result in material differences between the rent charged for assisted and comparable unassisted units, as determined by the government; *provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial contract rents.*

The two provisions (automatic annual adjustments and overall limitation) must be read together and harmonized. Taken alone, the provision for automatic annual adjustments gives little guide to the basis for selecting factors.[25] The overall limitation supplies that basis. It directs that the factors selected by HUD shall maintain, without increasing or decreasing, the difference between the initial rents and market rents. In other words, the factors should measure the *movement* in market rents and adjust rents accordingly. That is exactly how HUD interpreted and administered the rent adjustment process until 1981.

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25. In 1983 HUD seized on that fact in an attempt to justify basing factors on changes in operating costs, rather than changes in market rents. The attempt was dropped after prompting the following remarks from Chairman Gonzales of the House Subcommittee on Housing:

(Cont'd)

To implement its understanding of the two provisions, HUD annually selected Automatic Annual Adjustment Factors ("AAAFs") based on the *movement* of rents in various georgraphic areas, and published those factors in the Federal Register. The factors were percentage figures, required by regulation to be applied against current rents to produce the new rents. For example, if the rental movement factor is 5% and the current rents are $350 per month, the adjusted rents for the following year would be 105% of $350, or $367 per month.

HUD'S understanding of the program was described in the *Rainer View* case by a number of HUD officials. Lynn Stowell, HUD Director of Housing in Seattle, testified:

> Q. The automatic adjustment process, the way you understand it, was basically an inflation hedge, was it not?
>
> A. Yes.
>
> Q. And that was the way it was explained to developers and lenders?
>
> A. Yes.

(Cont'd)

I recognize the Department is undoubtedly being directed to stick by its guns through the orders of the Office of Management and Budget. But it is a sorry day when any agency of the government, in the name of economy, stands ready to corrupt contracts, vitiate and violate the law, and generally operate in a style more appropriate to a small time dictatorship." *Section 8 Rent Adjustments, Elderly Housing and Other Assisted Housing Issues: Hearing Before the Subcommittee on Housing and Community Development of the House*

> Q. I am not trying to put words in your mouth, but so that if market rents went up 15%, you would expect contract rents to go up 15%?
>
> A. Yes.[26]

Ray Bradley, Seattle HUD Director of Development, testified:

> Q. Wasn't it your understanding then that if the market was at this level and contract rents were, say, at this level that the idea of the adjustment was that the contract rents would rise with the market rents, is that correct?
>
> A. Yes, that was my understanding.
>
> Q. If market rents went up 10%, your contract rents went up the same 10%.
>
> A. The same gap would be maintained.[27]

The program ran smoothly from 1974 to 1981. Each year, HUD designated the geographical areas and selected the factors based on the overall limitation, and adjusted rents accordingly.[28]

26. *See Rainier View* case, excerpts of record 64.

27. *Ibid.*

28. The process can be traced through HUD regulations, handbooks, and detailed written methodologies. It started with factors developed by the economic analysis arm of HUD, which develops factors for cities and other areas by using rental market information derived from a number of data sources and market analysis. *See* Methodologies, Appendix B and C, *infra*, 8a-24a. Handbook provisions directed local offices to revise the factors if they were either too high or too low. As all of this makes clear, the factor process has built in safeguards against the "anomalous" results HUD pretends to fear.

The "same gap" was maintained.

In 1981, as inflation drove Section 8 rents higher and housing budgets became smaller, some HUD offices took it upon themselves to ignore the automatic annual rent adjustment process. Instead of comparing the movement of rents and translating it into factors, certain offices started to recompare projects, invariably concluding that the Section 8 rents were "excessive." Instead of a system which maintained a base (initial rents) and moved upward or downward according to market conditions, HUD attempted to set a new base. The purpose of the process changed from protecting the value of the original rents to undercutting that value.

To the extent that chaos can be called process, the process began with untrained HUD clerks (not appraisers) calling around to see if they could find any "comparable" market rents that were lower than those of the Section 8 project arbitrarily selected for review. Of course, they always did, even if they had to "compare" a downtown highrise Section 8 project for the elderly with a dilapidated walk-up apartment on the edge of town.

By "recomparing" projects, HUD was undermining the original relationship between the Section 8 project and the market, in direct violation of its written promise. It was as if original rents had never been agreed upon. Everything was starting from "ground zero," even though HUD had agreed on the original relationship between project rents and the market in an effort to induce the developer to execute a contract.

Invariably, the new process resulted in rent adjustments that were lower than those based on the *movement* of rents. In many cases the new process was used not only to deny increases, but to substantially *cut* existing rents, regardless of the impact on the owner.

All of this was done without regulations, handbook

provisions, or any other standards or guidelines. The reports of trained appraisers challenging HUD's "comparability" studies were ignored. If hearings were allowed, neither the owner nor his representative were allowed to ask questions. Normally the HUD official who cut the rents made the determination whether or not he would undo his own handiwork. To say that the process was bizarre unduly dignifies it.

When finally challenged, HUD attempted to justify its rent cutting by reference to the "overall limitation" clause. It now saw that clause not as a limitation on the selection and modification of the factors, but as an *independent* rent adjustment method not mentioned in the contract. HUD had not yet invented its two-tiered or "capping" argument, and of course that argument would be inadequate to explain *cutting* existing rents.[29]

To give an illustration, if Dally's rents should have gone to $472.50 based on market movement, they were instead *reduced* to $375 by "comparing" his well located brick high rise apartments with two story wooden walk up apartments on the edge of town. The effect was to destroy the original relationship of Dally's apartments to the market. Worse yet, the objective rent system which Dally had bargained for was now replaced by a subjective system vulnerable to bureaucratic whims of favoritism or retribution. Instead of being able to rely on uniform published

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29. In 1987 Congress stated that it never intended the process to *cut* rents unless deflation occurred and HUD published a negative factor. H.R. Rep. No. 122, 100th Cong., 1st Sess. (1987):

> When it enacted the Section 8 program, the Congress intended that rents for project based assisted projects would be reduced only if the published Automatic Annual Adjustment Factor ("AAAF") was negative. . . .

factors open to public scrutiny, evenly applied to all, Dally was subjected to back room manipulations of rent which he originally had been assured went out with the discredited Section 236 program.

The Ninth Circuit in *Rainier View* held that HUD's new "system" made a mockery of its contract election of a factor method of rent adjustment.

3. HUD's third major misstatement is that the *Rainier View* and *Alpine* decisions "invalidate a key provision in a substantial federal program designed to provide housing for low income tenants . . . and threaten to inflict widespread harm on a major social welfare program."[30] That statement is also false. Its hysterical tone is again intended to mask HUD's attempts during the 1980's to euthanatize a successful program of the 1970's to privatize low income housing.

More to the point, *Rainier View* did not tell HUD to abandon its mandate. It simply held that the mandate must be carried out within the framework of HUD's contractual election of a factor method of rent adjustment. Although *Rainier View* is based on an analysis of the contract and the statute, the same result would be reached using a straight analysis of the contract and applying ordinary principles of contract interpretation.[31]

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30. Petition for Certiorari, p. 11.

31. It is HUD, not plaintiffs, which has a record of strained interpretations. For example, in 1988 a congressional subcommittee dealing with HUD's interpretation of a 1987 congressional mandate not to cut Section 8 rents, said that "nothing could be more convoluted and tortuous than HUD's interpretation of . . . the 1987 Act." In *Rainier View*, the trial court accused HUD of conjuring up "linguistic loopholes which the government has sought to exploit . . ." *See* Petition for Certiorari in *Rainier View* at p. 54a.

Rainier View does not invalidate a contract provision. The decision validates a contract provision for rent adjustments, the parties understanding of that provision, and HUD's practical application of that provision for seven years. The decision does not do widespread harm to a program, it supports that program. The decision makes it safer to do business with HUD, which is good for low income housing. The decision validates an experiment in privatization, which Secretary Kemp now claims is the key to housing the poor. In short, *Rainier View* not only recognized but gave full effect to the overall limitation.

As it did from 1974 to 1981, HUD can still make as many studies of rent movement as it wants in any area it wants. But the study is to measure market *movement*, which then must be translated to published factors to protect the openness and uniformity which is imperative to a principled system. HUD is unable to show why the system which operated effectively for years will not produce an accurate measurement of market *movement*.[32] The answer is that HUD does not want to measure market *movement*. HUD's real purpose is to undermine the original relationship of rents to market, which it agreed upon when the developers executed contracts and pledged those contracts as security for financing.

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32. HUD has been using the factor method of rent adjustment since 1989, even though it was given authority under Section 801 to do project-by-project comparability if it first published regulations. If the factor method of rent adjustment was such a drain on the treasury, surely HUD would have implemented comparability under Section 801 long ago. It was not prohibited from doing so, except for the few plaintiffs in this case.

HUD has not published regulations for comparability (even though required to do so by June 15, 1990) for one obvious reason. Publication would expose the fact that HUD is not interested in accurately measuring market movement of rents. Its only interest is in undermining the original relationship of rents to market.

REASONS FOR DENYING THE WRIT

Although the Ninth Circuit's decision in *Alpine* needs no additional gloss, a few observations are in order.

1. In *Alpine*, the Ninth Circuit held that plaintiffs have bargained-for contract rights to factor based rent adjustments. Those rights are supported by independent consideration and are therefore vested under *Lynch* and *Perry*. HUD offers no basis to distinguish *Lynch* and *Perry*, other than to repeat its claim that plaintiffs do not have contract rights to factor based rent adjustments.

2. HUD's attempt to put Section 801 in the category of "curative" legislation is patently wrong. Unliquidated claims, not based on contract, can of course be resolved by Congress. The cases cited by HUD support that proposition, but nothing more.[33] HUD fails to reveal how those cases support Congress' abrogation of contract rights, whether or not under the guise of "curative legislation."

Here, plaintiffs' claims are supported by "investment-backed expectations." Plaintiffs invested their money in special use buildings in return for HUD's promise of hassle-free rent adjustments. Congress cannot take away plaintiffs' rights under the guise of curative legislation.

3. HUD equates the power to amend a statute with the power

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33. *Opdyke Investment Co. v. Detroit*, 883 F.2d 1265 (6th Cir. 1989) (retroactive application of Act precluding anti-trust damages permitted as to unliquidated claims — did not involve vested contract rights); *Graham and Foster v. Goodcell*, 282 U.S. 409, 426-30 (1931) (a defect in the administration of the Internal Revenue Code can be cured by retroactive legislation — did not involve vested contract rights).

to amend existing contracts. It cites the case of *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) for the doctrine of "sovereign power" to repudiate its contract obligations. As the Ninth Circuit pointed out, *Bowen* involved "benefits, gratuitously conferred by statute." That is a far cry from the "bargained-for contract rights" involved in this case.

4. HUD claims some rational purpose for Section 801 other than to save money. As the Ninth Circuit pointed out, settling a dispute which the government itself created is not a rational basis for the government repudiating its own contracts. Since HUD was "unable to present any argument explaining Section 801 other than Congress' attempt to save money", the case falls within *Lynch* and *Perry*.

CONCLUSION

The Ninth Circuit decision is clearly correct. HUD offers no legitimate grounds for reversing that decision. The petition should be denied.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED JUNE 6, 1988

RAINIER VIEW ASSOCIATES, a Washington limited partnership; Kurtis R. Mayer and Pamela Mayer, dba/ Mayer Built Homes,

Plaintiffs-Appellants,

v.

UNITED STATES of America, acting Through the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant-Appellee.

No. 86-3685.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted May 5, 1987.
Submission Vacated June 1, 1987.
Resubmitted March 7, 1988.
Decided June 6, 1988.

Warren J. Daheim, Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, Seattle, Wash., for plaintiffs-appellants.

Mack A. Player, Dept. of Justice, Civ. Div., Washington, D.C., for defendant-appellee.

Appeal from the United States District Court for the Western

Appendix A

District of Washington.

Before FLETCHER, BOOCHEVER and NORRIS, Circuit Judges.

PER CURIAM:

In this action for declaratory relief, we consider a question of contract interpretation concerning the method by which the United States Department of Housing and Urban Development ("HUD") may alter its method of calculating annual rent adjustments for government-assisted housing projects. The district court granted summary judgment in favor of the United States and against Rainier View Associates (Rainier), a developer and owner of Section 8 housing. We reverse.

I

Around 1974; pursuant to the enactment of Section 8 of the United States Housing Act of 1987, as amended, 42 U.S.C. § 1487f, HUD implemented a program to encourage the private sector to build rental housing for low-income people. HUD solicited private developers to submit bids to construct specialized housing at specific locations. Successful bidders were awarded Housing Assistance Payment (HAP) contracts, either directly or through local public housing agencies as the contract administrators. Under the HAP contract, the developer/owner collects a portion of the contract rent directly from the tenant, while the remainder is paid to the owner by HUD through the contract administrator.

Section 8(c)(2)(A) requires that the HAP contract provide for periodic adjustment of the maximum monthly rent (and thus of HUD's contribution) "to reflect changes in the fair market rentals

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established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 42 U.S.C. § 1437f(c)(2)(A). Section 8(c)(2)(C) places a limitation on the permissible adjustments so that they "shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." 42 U.S.C. § 1437f(c)(2)(C).

Section 1.9 of the HAP contract at issue in this case contains provisions designed to carry out the mandates of section 8(c)(2):

* * * * *

b. *Automatic Annual Adjustments.*

(1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register . . . .

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

* * * * *

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d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

On April 9, 1980, Rainier executed a HAP contract for a term of twenty years with the Housing Authority of the City of Bremerton (Bremerton). In 1981 and 1982, Bremerton granted Rainier annual rent adjustments for its Section 8 housing project based upon HUD's published Automatic Annual Adjustment Factors (AAAFs). However, in 1988, Bremerton refused to grant Rainier the annual adjustment that would have resulted from the application of the AAAFs published by HUD in the *Federal Register* on January 20, 1988. Instead, Bremerton insisted that Rainier conduct a rent study of the housing in the project's vicinity in order to justify any adjustment in the maximum rent allowances. Rainier refused and commenced this action in the district court, seeking a declaratory judgment that under the HAP contract, it was entitled to an automatic annual adjustment based on the latest published AAAFs.

The district court granted summary judgment for HUD, ruling that as a matter of law the HAP contract unambiguously permits HUD (in this case through its agent, Bremerton) to withhold the annual rent adjustment outlined in section 1.9b when such an adjustment would violate the overall limitations provision in Section 1.9d. Rainier appealed.

Appendix A

II

A grant of summary judgment is reviewable *de novo*. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). Federal law controls when interpreting a government contract. *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir.), *cert. denied*, 464 U.S. 892, 104 S.Ct. 236, 78 L.Ed.2d 227 (1983). The interpretation of a contract presents a mixed question of law and fact. When, as here, the district court's decision is based on analysis of the contract language, the decision is reviewed de novo. *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 367 (9th Cir. 1985).

Section 8(c)(2)(A) allows adjustments based either on market surveys, "or, if the Secretary determines, on the basis of a reasonable formula." Rainier contends that in Section 1.9b of the HAP contract HUD *elected* to rely exclusively on the AAAF formula process, instead of on an individualized "market survey" method. By switching to an individualized "market survey" method, Rainier argues, HUD reneged on its obligation. Rainier explains that the "overall limitation" in Section 1.9d is a limitation on HUD's calculation of the AAAFs. Accordingly to Rainier, the clause may *not* be construed as providing HUD with an independent basis for refusing to apply the published AAAFs. Rainier argues that by invoking the "overall limitation" provision as an independent basis for adjusting the maximum allowable rent, even though the latest published AAAFs show that a greater adjustment is indicated, HUD is seeking to nullify its election.

HUD counters that Section 1.9d of the HAP contract authorizes the government to limit adjustments that would occur through the use of the AAAF formula when use of that formula would result in a material difference between the rents charged for assisted and comparable unassisted housing. HUD argues that the language of Section 1.9d, which provides, "Notwithstanding any

other provisions of this contract, adjustments as provided in this Section shall not result in material differences between rents charged for assisted and comparable unassisted housing units . . . , authorizes HUD to override the formula process for determining rent adjustments.

HUD misconstrues the role of the overall limitation. The overall limitation provision in section 1.9d, consistent with its statutory analog, Section 8(c)(2)(C), is clearly a limitation on the calculation of the formula used to adjust rents, not an independent basis for making annual rent adjustments. Under the statute, HUD could choose either a market survey method (described in the first clause of Section 8(c)(2)(A)) *or* a formula method (described in the second clause of Section 8(c)(2)(A)). In the contract, HUD elected the formula method. Having made its choice, HUD cannot now change its mind. The overall limitation provision of the statute and the contract permit HUD to adjust the formula factors in light of market conditions, but it does not permit HUD to abandon entirely the formula method it chose and to adjust rents solely on the basis of a market survey. HUD's interpretation of the overall limitation provision would render the formula method authorized by the statute and elected in the contract a nullity. It would make all rent adjustments depend on the market survey method.

Not only is HUD's interpretation of Section 1.9d of the contract foreclosed by the contract language, it is inconsistent with the role of the overall limitation provision described in the regulations. 24 C.F.R. § 888.204 (1987) provides that

> "[i]f the application of the Annual Adjustment Factors results in rents that are substantially lower than rents charged for comparable units not receiving assistance . . . , in the area for

> which the factor was published or a portion thereof, and it is shown to HUD that the costs of operating comparable rental housing have increased at a substantially greater rate than the Adjustment Factors, the HUD Field Office will consider establishing separate or revised Automatic Annual Adjustment Factors for that particular area."

Thus, HUD's own regulations interpret the overall limitation provision in the statute the same way we interpret the overall limitation provision in the contract — as permitting adjustment of the AAAFs, not abandonment of the formula method whenever application of the formula would result in a disparity between section 8 and other rents.

In sum, the contract clearly elects the formula method, one of two statutorily authorized methods for calculating rent adjustments. The overall limitation provision just as clearly authorizes modifications of the formula applied to keep assisted rents in line with market rents. What the overall limitation provision does *not* do is permit HUD to switch from one method to another. That is clear from the contract language, and is consistent with the statutory language and HUD's own regulations interpreting the statute. We thus hold that the contract unambiguously support Rainier's interpretation. Accordingly, the district court erred in denying Rainier's motion for summary judgment and in granting summary judgment in favor of HUD.

Rainier's request for its attorneys' fees on appeal pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), should be considered by the district court.

The judgment of the district court is

REVERSED.

APPENDIX B — METHODOLOGIES

Methodology Used to Develop Automatic Annual Adjustment Factors for the Section 8 Housing Assistance Payments Program Effective November 8, 1980

Section 8(c)(2)(A) of the United States Housing Act of 1937, as amended, specifies that an assistance contract made pursuant to Section 8 shall provide for adjustments annually or more frequently in the maximum monthly rents to reflect changes in the fair market rentals, and further specifies, if the Secretary determines, that these adjustments be made on the basis of a reasonable formula. Subpart B of Part 888 of the Code of Federal Regulations established general guidance in regard to the development and use of Automatic Annual Adjustment Factors (AAFs), the manner of publication, and the revision of factors for a particular area by HUD Field offices.

Pursuant to the regulations, the Headquarters Economic and Market Analysis Division produces Annual Adjustment Factors for selected (currently 34) Standard Metropolitan Statistical Areas (SMSAs) and the 4 Census Regions based on rent and utility inflation factors developed from the "Rent, residential" and "Fuel and Other Utilities" components of the Consumer Price Index for All Urban Consumers (CPI(U)). Normally, these inflation factors are based on changes in the CPI rent and utility indexes for the most recent 12 month period, but they may, for selected areas, be based on changes in the CPI indexes for other time periods or be adjusted to reflect rental market information derived from other data sources or market analysis.

A single factor is developed for use in adjusting Contract Rents (excluding utilities), and a matrix of 105 separate factors, reflecting differences for various rent ranges and bedroom sizes, is developed for adjustment of Contract Rents including all utilities (Gross Rents). The following is an example of the format used to publish the AAFs in the Federal Register:

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SECTION 8 HOUSING ASSISTANCE PAYMENT PROGRAMS ANNUAL ADJUSTMENT FACTORS SMSA: ANAHEIM-SANTA ANA-GARDEN GROVE, CA

MONTHLY GROSS RENT	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4+ BEDROOMS
UNDER $125	1.133	1.143	1.157	1.174	1.185
125-149	1.130	1.138	1.150	1.163	1.172
150-174	1.128	1.135	1.144	1.156	1.164
175-199	1.126	1.132	1.141	1.151	1.157
200-224	1.125	1.130	1.138	1.146	1.152
225-249	1.124	1.128	1.135	1.142	1.149
250-274	1.123	1.128	1.134	1.141	1.146
275-299	1.123	1.127	1.132	1.139	1.143
300-324	1.122	1.126	1.131	1.137	1.141
325-249	1.122	1.125	1.130	1.135	1.139
350-374	1.121	1.124	1.129	1.134	1.137
375-399	1.121	1.124	1.128	1.133	1.136
400-424	1.121	1.123	1.127	1.132	1.135
425-449	1.120	1.123	1.127	1.131	1.134
450-474	1.120	1.123	1.126	1.130	1.133
475-499	1.120	1.122	1.125	1.129	1.132
500-524	1.120	1.122	1.125	1.129	1.131
525-549	1.120	1.122	1.125	1.128	1.130
550-574	1.119	1.121	1.124	1.128	1.130
575-599	1.119	1.121	1.124	1.127	1.129
600 +	1.119	1.121	1.124	1.127	1.129

ANNUAL ADJUSTMENT FACTOR FOR CONTRACT RENT (EXCLUDING UTILITIES) is 1.116

Development of AAFs for Contract Rents (excluding utilities)

With two exceptions, the AAFs for Contract Rents (excluding utilities) effective November 8, 1980 were developed on the basis of rent inflation factors derived from the residential rent component of the CPI for the 12-month period from April or May 1979 to April or May 1980, depending on the month designated for data collection in each market area.

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The inflation factor applicable to the San Francisco SMSA was derived from the trend in the CPI rent index between August 1979 and April 1980, and the inflation factor for the Anchorage SMSA was derived from the CPI trend between January 1980 and May 1980. The use of the different time periods for calculation of the inflation factors for the San Francisco and Anchorage SMSAs was adopted to avoid questionable short-term fluctuations in the CPI rent indexes for those areas.

A table indicating the rent inflation factors applicable to the 4 Census Regions and the 34 SMSAs for which CPI data currently is available is attached.

The following example illustrates the development of the AAFs for Contract Rents (excluding utilities) for the Anaheim-Santa Ana-Garden Grove SMSA, which as indicated at the bottom of the preceding table of Annual Adjustment Factors has been established at 1.116:

$$\frac{\text{CPI rent index May 1980}}{\text{CPI rent index May 1979}}\ \frac{207.6}{186.0} = 1.116$$

Development of AAFs for Contract Rents Including Utilities (Gross Rents)

As indicated, a matrix of 105 separate factors, reflecting differences for various rent ranges and bedroom sizes, is developed for adjustment of Gross Rents.

The AAFs for Gross Rents effective November 8, 1980 were developed on the basis of rent and utility inflation factors derived from the residential rent, and fuel and utilities components of the CPI. The rent inflation factors are the same as those used for the development of the AAFs for Contract Rents (excluding utilities). Estimates of utility costs by bedroom size established as part of the Fair Market Rent schedules for Section 8 Existing Housing in 1979, and two sets of utility inflation factors were used to develop the utility portion of the AAFs for Gross Rents.

The most recent annual utility inflation factors reflect changes in the fuel and utilities component of the CPI for the 12-month period from April or May 1979 to April or May 1980. The utility inflation

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factors for the previous year generally reflect changes in the utilities component of the CPI between April or May of 1978 and 1979; but, for some areas, they may reflect changes for other time periods or adjustments based on other data or market analysis.

The estimates of utility costs by bedroom size for 1979, as determined from the Annual Housing Survey (AHS) national sample for 1977 updated to 1979 by use of the CPI national index for utilities, are as follows:

Number of Bedrooms	0	1	2	3	4
Fuel and Utility Costs	$20	31	47	66	79

A table indicating the rent and utility inflation factors applicable to the 4 Census Regions and 34 SMSAs is attached.

The following example illustrates the development of one of the 105 factors in the matrix of adjustment factors for Gross Rents applicable to the Anaheim-Santa Ana-Garden Grove SMSA (Monthly Gross Rent range of $225-249 and 2 Bedroom Unit):

The objective is to develop Annual Adjustment Factors reflecting differences for various rent ranges and bedroom sizes.

Step 1. Calculate the mid-point of the selected Gross Rent range (to be used to represent the Gross Rent for this rent range for 1980):

$$\frac{\$249.99 - 225.00}{2} = \$12.50 \qquad \$225.00 + 12.50 = \$237.50$$

Step 2. Update the utility cost for a 2 Bedroom Unit from 1979 to 1980 using the calculated utility inflation factor from the attached table:

$47.00 × 1.1550 = $54.29 Utility component 1980

Step 3. Use the utility cost estimate for 1980 to calculate the rent component of the mid-point rent as of 1980:

$237.50 – 54.29 = $183.21 Rent component 1980

Step 4. Update the utility cost for a 2 Bedroom Unit from 1980 to 1981 using the appropriate utility inflation factor from the attached table:

$54.29 × 1.2010 = $65.20 Utility component 1981

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Step 5. Update the rent component of the mid-point rent from 1980 to 1981 using the rent inflation factor from the attached table:

$183.21 × 1.1160 = $204.46 Rent component 1981

Step 6. Add the rent and utility components calculated in steps 4 and 5 to obtain a mid-point rent for 1981:

$65.20 + 204.46 = $269.66 Mid-point rent 1981

Step 7. Calculate the AAF for the 2 Bedroom Unit in the $225-249 rent range by dividing the mid-point rent for 1981 by the mid-point rent for 1980:

$$\frac{\$269.66}{237.50} = 1.135 \text{ AAF for Gross Rent}$$

Checking the table of AAFs for Gross Rents for the Anaheim-Santa Ana-Garden Grove SMSA reveals that the AAF for the 2 Bedroom Unit in the $225-249 rent range is given as 1.135 as illustrated in the above example.

Note: See attached table for Rent and Utility Inflation Factors.

Appendix B

RENT AND UTILITY INFLATION FACTORS
Used to Develop Automatic Annual Adjustment Factors
Effective November 8, 1980

SMSA CODE	CENSUS REGION OR SMSA	1980-1981 RENT FACTORS	1979-1980 UTILITY FACTORS	1980-1981* UTILITY FACTORS
—	NORTHEAST	1.0740	1.2247	1.2500
—	NORTH CENTRAL	1.0790	1.1425	1.1550
—	SOUTH	1.0920	1.1266	1.1430
—	WEST	1.1060	1.1243	1.2070
360	ANAHEIM-SANTA ANA-GARDEN GROVE	1.1160	1.1550	1.2010
380	ANCHORAGE	1.0030	1.0911	1.0900
520	ATLANTA	1.0720	1.0994	1.1160
720	BALTIMORE	1.0670	1.0583	1.1810
1120	BOSTON	1.0780	1.3229	1.2840
1280	BUFFALO	1.0540	1.1782	1.2420
1600	CHICAGO	1.0900	1.1328	1.1630
1640	CINCINNATI	1.1040	1.0860	1.1370
1680	CLEVELAND	1.0690	1.1789	1.1500
1920	DALLAS-FORT WORTH	1.0960	1.0560	1.0390
2080	DENVER-BOULDER	1.0970	1.1435	1.1630
2160	DETROIT	1.1000	1.1508	1.1340
2960	GARY-HAMMON-EAST CHICAGO	1.0900	1.1328	1.1630
3320	HONOLULU	1.1060	1.0398	1.1440
3360	HOUSTON	1.0600	1.2063	1.1530
3760	KANSAS CITY	1.0630	1.1529	1.0410
4480	LOS ANGELES-LONG BEACH	1.1160	1.1550	1.2010
5000	MIAMI	1.1220	1.0936	1.1480
5080	MILWAUKEE	1.0800	1.1857	1.2270
5120	MINNEAPOLIS-ST. PAUL	1.0960	1.0700	1.1260
5600	NEW YORK	1.0660	1.1997	1.2100
5640	NEWARK	1.0660	1.1997	1.2100
5745	NORTHEAST PENNSYLVANIA	1.0580	1.1704	1.1890
6000	OXNARD-SIMI VALLEY-VENTURA	1.1160	1.1550	1.2010
6040	PATTERSON-CLIFTON-PASSAIC	1.0660	1.1997	1.2100
6160	PHILADELPHIA	1.0610	1.2368	1.2830
6280	PITTSBURGH	1.0680	1.1110	1.1280
6440	PORTLAND	1.0730	1.2383	1.2940
6780	RIVERSIDE-SAN BERNARDINO	1.1160	1.1550	1.2010
7040	ST. LOUIS	1.1530	1.1204	1.0670
7320	SAN DIEGO	1.0900	1.1508	1.2700
7360	SAN FRANCISCO	1.0970	1.1275	1.1690
7600	SEATTLE-EVERETT	1.2070	1.2132	1.2840
8840	WASHINGTON	1.0860	1.1033	1.1460

* Dates indicated above for rent and utility factors apply to the period of use.
See the text of the AAF Methodology for references to data sources and dates.

APPENDIX C — METHODOLOGIES

Methodology Used to Develop Automatic Annual Adjustment Factors for the Section 8 Housing Assistance Payments Program Effective November 8, 1981

Section 8(c)(2)(A) of the United States Housing Act of 1937, as amended, specifies that an assistance contract made pursuant to Section 8 shall provide for adjustments annually or more frequently in the maximum monthly rents to reflect changes in the fair market rentals. This Section further specifies, if the Secretary determines, that these adjustments can be made on the basis of a reasonable formula. Subpart B of Part 888 of the Code of Federal Regulations establishes general guidance in regard to the development and use of Automatic Annual Adjustment Factors (AAFs), the manner of publication, and the revision of factors for a particular area by HUD Field Offices.

The methodology used by the Headquarters Economic and Market Analysis Division to develop the November 8, 1981 AAFs is based on a formula using the "Rent, residential" and "Fuel and Other Utilities" components of the Consumer Price Index for All Urban Consumers (CPI(U)) as of June 1981, and data from the 1978 and 1979 Annual Housing Surveys (AHS) updated to 1982. AAFs are developed for 37 Standard Metropolitan Statistical Areas (SMSAs) and the four Census Regions. Two sets of factors are developed; one for Contract Rents Including Highest Cost Utility, and one for Contract Rents Excluding Highest Cost Utility. A matrix of 50 separate factors, reflecting variations by rent ranges and bedroom sizes, is developed for each set of factors. The step-by-step procedures and the data used to develop the adjustments factors are as follows:

(1) Calculation of the increases in the Rent and Utilities components of the CPI for the most recent twelve-month period

(2) Calculation of a Shelter Rent increase factor by adjusting for the units in the CPI Rent Index that include heating costs

(3) Calculation of a single Gross Rent increase factor for each of the 37 SMSAs and the four Census Regions by weighting the Shelter Rent and Utility increases in accordance with National and Census Regional weights derived from 1979 AHS data

(4) Calculation of AAFs for Contract Rents Including Highest Cost Utilities (Gross Rents) that reflect differences for rent ranges and bedroom sizes developed from 1978 and 1979 AHS data

(5) Calculation of AAFs for Contract Rents Excluding Highest Cost Utilities (Shelter Rents) by development of shelter rents for 1982 and 1981, and comparison of the 1982 rents with the 1981 rents

A detailed description of the step-by-step procedures and the data used to develop the Automatic Annual Adjustment Factors for both Gross Rents and Shelter Rents is given in the following paragraphs:

An example of the AAF calculations for the Boston SMSA is given following the description of the Methodology.

(1) *Calculation of Rent and Utility Increase Factors Based on CPI*

Rent and Utility increase factors for the most recent twelve-month period were calculated by dividing the most recent Rent and Utility price index from the CPI by the index for the same month one year earlier as shown in Table A below:

Appendix C

Table A
Rent and Utility Increase Factors Based on Change in CPI

Census Region or SMSA	Survey Month	Rent Index 1980	Rent Index 1981	Increase Factor	Util. Index 1980	Util. Index 1981	Increase Factor
Northwest Census Region	June	117.1	126.3	1.0786	143.2	168.7	1.1781
North Central Census Region	June	119.4	127.7	1.0695	134.2	150.7	1.1230
South Census Region	June	122.4	132.0	1.0784	127.0	144.9	1.1409
West Census Region	June	125.9	138.7	1.1017	141.3	149.1	1.0552
Anaheim-Santa Ana-Garden Grove, CA	June	212.0	235.2	1.1094	233.9	250.9	1.0727
Anchorage, AK	May	157.8	165.9	1.0513	194.7	217.9	1.1192
Atlanta, GA	June	166.6	187.8	1.1273	259.9	276.9	1.0654
Baltimore, MD	May	172.9	187.7	1.0856	266.4	309.1	1.1603
Boston, MA	May	194.4	218.7	1.1250	312.8	380.7	1.2171
Buffalo, NY	June	176.7	184.7	1.0453	346.4	408.6	1.1796
Chicago, IL	June	172.3	183.8	1.0667	253.8	285.0	1.1229
Cincinnati, OH-KY-IN	May	168.9	184.9	1.0947	287.5	318.9	1.1092
Cleveland, OH	June	169.1	178.3	1.0544	279.4	321.5	1.1507
Dallas-Fort Worth, TX	June	188.8	207.9	1.1012	243.6	305.9	1.2557
Denver-Boulder, CO	May	182.9	201.2	1.1001	243.0	276.7	1.1387
Detroit, MI	June	194.3	204.7	1.0535	294.9	335.6	1.1380
Gary-Hammond-East Chicago, IN	June	172.3	183.8	1.0667	253.8	285.0	1.1229
Honolulu, HI	June	205.6	229.1	1.1143	237.6	334.9	1.4095
Houston, TX	June	181.2	196.7	1.0855	317.2	377.2	1.1892
Jersey City, NJ	June	200.7	216.0	1.0762	316.5	375.3	1.1858
Kansas City, MO-KS	June	162.4	172.2	1.0603	265.3	299.0	1.1270
Los Angeles-Long Beach, CA	June	212.0	235.2	1.1094	233.9	250.9	1.0727
Miami, FL	May	121.9	141.6	1.1616	119,8	142.9	1.1928
Milwaukee, WI	May	178.4	193.3	1.0835	293.1	339.1	1.1569
Minneapolis-St. Paul, MN-WI	June	195.2	215.0	1.1014	266.9	320.3	1.2001
Nassau-Suffolk, NY	June	200.7	216.0	1.0762	316.5	375.3	1.1858
New Brunswick-Perth Amboy-Sayreville, NJ	June	200.7	216.0	1.0762	316.5	375.3	1.1858
New York, NY	June	200.7	216.0	1.0762	316.5	375.3	1.1858
Newark, NJ	June	200.7	216.0	1.0762	316.5	375.3	1.1858
Northeast Pennsylvania, PA	May	217.7	227.4	1.0446	348.0	412.7	1.1859
Oxnard-Simi Valley-Ventura, CA	June	212.0	235.2	1.1094	233.9	250.9	1.0727
Patterson-Clifton-Passaic, NJ	June	200.7	216.0	1.0762	316.5	375.3	1.1858
Philadelphia, PA-NJ	June	194.1	208.4	1.0737	292.3	345.0	1.1803
Pittsburgh, PA	June	185.9	199.4	1.0726	247.4	272.8	1.1027
Portland, OR-WA	May	200.3	215.7	1.0769	317.3	357.6	1.1270
Riverside-San Bernardino-Ontario, CA	June	212.0	235.2	1.1094	233.9	250.9	1.0727
St. Louis, MO-IL	May	166.1	177.6	1.0692	228.4	245.4	1.0744
San Diego, CA	May	221.2	243.4	1.1004	220.4	259.8	1.1788
San Francisco-Oakland, CA	June	212.8	233.2	1.0959	321.0	309.9	1.0000
Seattle-Everett, WA	May	225.3	240.7	1.0684	264.5	298.0	1.1267
Washington, DC-MD-VA	May	194.7	213.4	1.0960	252.5	287.6	1.1390

Appendix C

(2) *Calculation of a Shelter Rent Increase Factor*

(a) The residential rent component of the CPI is based on a sample of about 18,000 rental units. The rental data for some of the units in each of the areas surveyed includes the cost of heating. To calculate a Shelter Rent increase factor for each of the 37 SMSAs and the four Census Regions for which the CPI data was available, it was necessary to eliminate the cost of heating from the Rent component of the CPI, and this was accomplished by the use of the following formula:

$$I = A(CR + DU) + B(R)$$

(Solve for R to find Shelter Rent increase)

I = CPI residential rent increase factor

A = Percentage of rental units in the CPI sample that included the cost of heating

B = Percentage of rental units in the CPI sample that did not include the cost of heating

C = The ratio of Shelter Rent to Gross Rent

D = The ratio of Utilities to Gross Rent

R = Shelter Rent increase factor

U = CPI Utility increase factor

(b) The ratio of Shelter Rent and the ratio of Utilities to Gross Rent used in the above formula were derived from 1979 AHS data. The weight given to Shelter Rent was 70 percent, and the weight given to Utilities was 30 percent for all SMSAs, the North Central, South, and West Census Regions. The weights were 67 percent and 33 percent for the Northeast Census Region. The percentage of units in the CPI rental survey that included the cost of heating, and the Shelter Rent increase factors calculated by use of the preceding formula are shown in Table B below.

Appendix C

(3) *Calculation of a Gross Rent Increase Factor*

(a) A single Gross Rent increase factor for each of the 37 SMSAs and the four Census Regions was calculated by weighting the percentage increase in Shelter Rent and the percentage increase in Utilities in accordance with the weights derived from the 1979 AHS as given in paragraph (2)(b) above. The formula used for the calculation was as follows:

G = A(R) + B(U)
(Solve for G to find Gross Rent increase)

G = Gross Rent increase factor

A = Weight applicable to Shelter Rent

B = Weight applicable to Utilities

R = Percentage increase in Shelter Rent

U = Percentage increase in Utilities

(b) The Gross Rent factors are shown in Table B below.

Appendix C

Table B

Percentage of rental units in the CPI rental survey that included the cost of heating, calculated Shelter Rent increase factor, and calculated Gross Rent increase factor for four Census Regions and 37 designated SMSAs

Census Region or SMSA	Percent of Units With Heat	Shelter Rent Factor	Gross Rent Factor
Northwest Census Region	44.5	1.061	.0999
North Central Census Region	38.1	1.063	.0807
South Census Region	20.9	1.074	.0943
West Census Region	21.6	1.105	.0900
Anaheim-Santa Ana-Garden Grove, CA	12.5	1.111	.0994
Anchorage, AK	58.1	1.037	.0616
Atlanta, GA	17.7	1.131	.1111
Baltimore, MD	34.9	1.077	.1019
Boston, MA	46.9	1.110	.1421
Buffalo, NY	22.2	1.036	.0789
Chicago, IL	51.7	1.056	.0610
Cincinnati, OH-KY-IN	52.7	1.092	.0971
Cleveland, OH	36.6	1.043	.0750
Dallas-Fort Worth, TX	36.7	1.082	.1341
Denver-Boulder, CO	35.7	1.087	.1026
Detroit, MI	42.3	1.041	.0702
Gary-Hammond-East Chicago, IN	51.7	1.056	.0763
Honolulu, HI	00.0	1.000	.1229
Houston, TX	41.8	1.071	.1063
Jersey City, NJ	64.3	1.050	.090[illegible]
Kansas City, MO-KS	25.6	1.055	.076[illegible]
Los Angeles-Long Beach, CA	12.5	1.111	.0994
Miami, FL	2.3	1.161	.1708
Milwaukee, WI	35.0	1.075	.0995
Minneapolis-St. Paul, MN-WI	34.7	1.090	.1230
Nassau-Suffolk, NY	64.3	1.050	.0908
New Brunswick-Perth Amboy-Sayreville, NJ	64.3	1.050	.0908
New York, NY	64.3	1.050	.0908
Newark, NJ	64.3	1.050	.0908
Northeast Pennsylvania, PA	26.5	1.032	.0785
Oxnard-Simi Valley-Ventura, CA	12.5	1.111	.0994
Patterson-Clifton-Passaic, NJ	64.3	1.050	.0908
Philadelphia, PA-NJ	58.0	1.051	.0899
Pittsburgh, PA	39.4	1.069	.0788
Portland, OR-WA	14.3	1.075	.0904
Riverside-San Bernardino-Ontario, CA	12.5	1.111	.0994
St. Louis, MO-IL	21.0	1.069	.0705
San Diego, CA	6.8	1.099	.1228
San Francisco-Oakland, CA	8.6	1.098	.0689
Seattle-Everett, WA	12.3	1.066	.0843
Washington, DC-MD-VA	55.5	1.088	.1030

Appendix C

(4) *Calculation of AAFs for Contract Rents Including Highest Cost Utilities*

(a) The distribution of all rental units covered in the 1979 AHS national sample shows that the 1978 to 1979 median percentage increases in gross rents declines at subsequently higher rent intervals. The data also suggest that the percentage increase at each rent level rises as the number of bedrooms increases. The actual distribution of units and the rent increases taken directly from the AHS data are shown in Table C.

(b) Increases for all rent intervals and bedroom sizes could not be obtained directly from the AHS data because of the small number of cases in the survey sample. This was especially true in regard to the number of efficiency and four-bedroom units. Estimated distributions were made in these categories to develop a complete matrix covering all rent ranges and bedroom sizes. The complete matrix is shown in Table D.

(c) Intermediate adjustment factors necessary to complete a matrix of percentage rent increases based on the single Gross Rent factor and the variations shown for rent ranges and bedroom sizes were delivered by dividing the factors in Table D by 6.5 percent, which is the overall rent increase from the 1979 AHS sample of rental units matched in 1978 and 1979. The intermediate adjustment factors developed by this procedure are shown in Table E.

(d) The intermediate adjustment factors in Table E were updated to 1982 by increasing the 1978 rent levels by 33.3 percent, which was the median rent increase for the four-year period. The updated factors necessary to compute percentage rent increases in Gross Rents by rent range and bedroom size based on the single Gross Rent factor developed for the most recent twelve-month period are shown in Table F.

Appendix C

(e) The AAFs for Contract Rents Including Highest Cost Utility applicable to each Census Region and the 37 designated SMSAs were calculated by multiplying the single Gross Rent increase factor developed for each area in Step (3) by the intermediate adjustment factors shown in Table F, and adding 1 to the result.

Tables C, D, E, and F are shown following the description of Step (5) below:

(5) *Calculation of AAFs for Contract Rents Excluding Highest Cost Utilities*

(a) The AAFs for Contract Rents Excluding Highest Cost Utility were calculated by developing a 1982 shelter rent for each $50 rent interval, and then dividing the 1982 shelter rent by the mid-point of the rent interval, which represents the 1981 shelter rent to be adjusted.

(b) The 1982 shelter rents were developed in a series of steps by (1) calculating 1981 utility costs for each bedroom size unit, and then adding the utility cost to the mid-point of each rent interval to obtain 1981 gross rents, (2) calculating a 1982 gross rent by applying the appropriate AAF for gross rent, and (3) calculating 1982 utility costs, and then subtracting the utility cost from the gross rent.

(c) The 1981 utility costs were calculated by updating 1979 utility costs for each Census Region derived from the AHS. The 1979 costs were increased by 21 percent, which was the overall utility increase indicated by the CPI. 1982 utility costs were calculated by updating the 1981 costs by the utility increase factor for each Census Region and SMSA shown in Table A. The 1979 utility costs from the AHS that were used in the preceding calculations were as follows:

AREA	0-BR	1-BR	2-BR	3-BR	4-BR
Northeast Census Region	50	65	80	95	110
North Central Census Region	35	50	65	80	95
South Census Region	35	50	65	80	95
West Census Region	30	40	50	60	70

Appendix C

TABLE C

Median percentage change in Gross Rent from 1978 to 1979 and number of cases in sample, by rent range and bedrooms where number of cases exceeds 100 units.

Gross Rent in 1978	0 bedrooms		1 bedroom		2 bedrooms		3 bedrooms		4 bedrooms	
	%	Units	%	Unit	%	Unit	%	Unit	%	Unit 1/
less than $100	12.5	100	12.2	302	12.1	260				
$100 to 149	8.0	138	7.9	751	10.2	766	8.9	201		
150 to 199	7.8	133	6.7	1,159	7.1	1,135	7.4	336		
200 to 249			7.0	927	6.4	1,326	4.8	400		
250 to 299			5.3	461	5.5	941	6.9	268		
300 to 349			4.8	134	5.0	459	5.3	232		
350 to 399					4.5	179	4.2	143		
400 to 449							4.9	111		
450 or more										

Note: Median percentage increase was 6.5 percent.
1/ Sample less than 100 units for each rent interval.
Source: 1978 and 1979 Annual Housing Survey, U.S. Summary (preliminary).

TABLE D

Estimated percentage change in gross rent from 1978 to 1979 by rent range and bedrooms based on Table C.

Gross Rent in 1978	0 bedrooms %	1 bedroom %	2 bedrooms %	3 bedrooms %	4 bedrooms %
less than $150	7.4	7.9	8.4	8.9	9.4
150 to 199	6.5	6.8	7.1	7.4	7.7
200 to 249	5.6	5.9	6.2	6.5	6.8
250 to 299	4.9	5.2	5.5	5.8	6.0
300 to 349	4.3	4.6	4.9	5.2	5.5
350 to 399	3.8	4.1	4.4	4.7	5.0
400 to 449	3.4	3.7	4.0	4.3	4.6
450 or more	3.1	3.4	3.7	4.0	4.3

Source: Estimated by EMAD, based on AHS.

Appendix C

TABLE E

Adjustment factors to be applied to median percentage increase in gross rent.

Gross Rent in 1978	0 bedrooms %	1 bedroom %	2 bedrooms %	3 bedrooms %	4 bedrooms %
less than $150	1.1385	1.2154	1.2923	1.3692	1.4462
150 to 199	1.0000	1.0462	1.0923	1.1385	1.1846
200 to 249	.8615	.9077	.9538	1.0000	1.0462
250 to 299	.7538	.8000	.8462	.8923	.9231
300 to 349	.6923	.7077	.7538	.8000	.8462
350 to 399	.5846	.6307	.6769	.7231	.7692
400 to 449	.5231	.5692	.6154	.6615	.7077
450 or more	.4769	.5231	.5692	.6154	.6615

Note: Factors developed from Table D for application to current CPI median gross rent percentage increase factor.

TABLE F

Adjustment factors updated to 1982 for application to percentage increase in gross rent developed for each Census Region and SMSA in Step (3) of AAF Methodology.

Gross Rent in 1982	0 bedrooms	1 bedroom	2 bedrooms	3 bedrooms	4 bedrooms
less than $200	1.1385	1.2154	1.2923	1.3692	1.4462
200 to 249	1.0346	1.0962	1.1577	1.2193	1.2808
250 to 299	.9306	.9770	1.0231	1.0693	1.1154
300 to 349	.8422	.8885	.9347	.9808	1.0193
350 to 399	.7538	.8000	.8462	.8923	.9231
400 to 449	.6962	.7423	.7885	.8346	.8693
450 to 499	.6385	.6846	.7308	.7769	.8154
500 to 549	.5808	.6269	.6731	.7192	.7616
550 to 599	.5231	.5692	.6154	.6615	.7077
600 or more	.4769	.5231	.5692	.6154	.6615

Note: The factors in Table F which reflect differences for rent ranges and bedroom sizes were applied to the single gross rent factor developed in Step (3) of the AAF Methodology to determine the AAFs for Contract Rents Including Highest Cost Utilities.

Appendix C

Example of Methodology Used for Calculation of AAFs as of Nov. 8, 1981 Boston, MA Standard Metropolitcan Statistical Area

(1) *Calculation of Rent and Utility Increase Factors Based on CPI*

$$\frac{\text{CPI Rent Index 1981}}{\text{CPI Rent Index 1980}} = \text{Rent Increase Factor} \quad \frac{218.7}{194.4} = 1.1250$$

$$\frac{\text{CPI Utility Index 1981}}{\text{CPI Utility Index 1980}} = \text{Utility Increase Factor} \quad \frac{380.7}{312.8} = 1.1271$$

(2) *Calculation of a Shelter Rent Increase Factor*

$I = A(CR + DU) + B(R)$ (See Methodology for identification of symbols)

$$R = \frac{I - ADU}{AC + B} \qquad R = \frac{1.125 - (.469)(.30)(1.2171)}{(.469)(.70) + .531} \qquad R = \frac{.9538}{.8593} \qquad R = 1.110$$

(3) *Calculations of a Gross Rent Increase Factor*

$G = A(R) + B(U)$ (See Methodology for identification of symbols)

$G = .70(.1100) + .30(.2171)$ $\quad G = .0770 + .0651$ $\quad G = .1421$

(4) *Calculation of AAFs for Contract Rents Including Highest Cost Utility*

Gross Rent Increase Factor developed in Step (3) above × Adjustment factor from Table F for each rent interval + 1 = AAF

$(.1421)(1.1385) + 1 = 1.162$ Calculated AAF for less than $200 rent interval

$(.1421(1.0346) + 1 = 1.147$ Calculated AAF for $200-249 rent interval

(Note: These examples are for the 0-Bedroom AAFs)

(5) *Calculation of AAFs for Contract Rents Excluding Highest Cost Utility*

1979 Utility Cost for 0-BR unit Northeast Census Region From AHS	$50
Increase in Utility Cost from 1979 to 1981 U.S. from CPI	× 1.21
1981 Utility Cost for 0-BR unit	$61
Increase in Utility Cost from 1981 to 1981 Boston SMSA from CPI	× 1.2171
1982 Utility Cost for 0-BR unit in Boston SMSA	$74
Mid-point of rent interval under $200 (1981 Shelter Rent)	$175
Plus 1981 Utility Cost	+ 61
1981 Gross Rent	$236
Multiply by AAF for Gross Rent at the $200-249 rent interval	× 1.147
1982 Gross Rent	$271
Minus 1982 Utility Cost	− 74
1982 Shelter Rent	$197

$$\frac{\text{1982 Shelter Rent}}{\text{1981 Shelter Rent}} = \text{AAF for Contract Rents Excluding Highest Cost Utility} \quad \frac{\$197}{\$175} = 1.126 \text{ AAF}$$

(Note: Approved AAF is 1.130 – difference is attributable to computer rounding)